Malcolm Joe DAVIS

v.

STATE of Mississippi.

No. 52659.

Supreme Court of Mississippi.

Sept. 9, 1981.

Opinion Modified On Denial of Rehearing Dec. 16, 1981.

Defendant was convicted before the Circuit Court, Pearl River County, R. I. Prichard, III, J., of rape, and he appealed. The Supreme Court, Patterson, C. J., held that: (1) delay of 150 days between arraignment and trial was not unreasonable; (2) two continuances were necessary and reasonable, and granting of such continuances was not violative of speedy trial statute; (3) eight-month delay from indictment to arraignment was not shown to have infringed on defendant's constitutional right to speedy trial; (4) defendant's constitutional right to counsel had been sufficiently protected in such case in which interrogation had ceased after deputies had immediately complied with defendant's request for counsel and in which defendant was subsequently advised of his rights and then waived them; (5) evidence was sufficient to establish corpus delicti of the crime of rape; and (6) permitting sheriff, who testified and who assertedly was the only law enforcement official available in the courtroom, to serve as a bailiff and remain in courtroom after witnesses had been placed "under the rule" was not abuse of discretion.

Affirmed.

Hawkins, J., dissented and filed opinion.

1. Criminal Law ⇐577.15(4)

Statutory 270-day time limitation was met in case in which defendant was indicted in March 1979, was arraigned in November 1979 and was brought to trial in April 1980, in light of the fact that the time prior to arraignment was not to be considered in determining whether there had been compliance with statute. Code 1972, § 99–17–1.

2. Criminal Law ⇐577.15(4)

Delay of 150 days between defendant's November 1979 arraignment and April 1980 trial at which he was convicted of rape was not unreasonable, in view of fact that trial court had two terms of criminal court each year, consisting of the March and November terms.

3. Criminal Law ⇐577.10(7, 8)

Eight-month continuance, which was granted on defendant's request in rape case so as to permit completion of psychological tests on him, and four-month continuance, which was granted because district attorney was required to be before grand jury for entire term of court and there were no assistant district attorneys to try the case at that time, were necessary and reasonable, and granting such continuances was not violative of speedy trial statute. Code 1972, § 99–17–1.

4. Criminal Law ⇐577.15(4)

Eight-month delay from rape indictment to arraignment was not shown to have infringed on defendant's constitutional right to speedy trial, absent any evidence in support of argument that it had been the custom of trial judge not to arraign criminal defendants until they were to be tried at the term. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐577.10(1)

Procedure of arraigning criminal defendants at the term set for trial has the potential to violate defendants' constitutional right to speedy trial. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐577.15(4)

Delay from time of March 1979 rape indictment, to November 1979 arraignment, to April 1980 trial was not shown to have violated defendant's right to speedy trial, though it was asserted that defendant's incarceration contributed to mental and physical deterioration. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐698(1)

Absent contemporaneous motion to exclude during trial, objection to admission of confession was waived.

8. Criminal Law ⇐412.2(5)

Defendant's constitutional right to counsel had been sufficiently protected in case in which interrogation had ceased after deputies had immediately complied with defendant's request for counsel by permitting defendant to talk with an attorney and in which, in an interrogation initiated by the sheriff nine hours later, defendant was advised of his rights and waived them. U.S.C. A.Const. Amend. 6.

9. Rape ⇐7

All that is necessary for the crime of rape is that there be some penetration of female's private parts by sexual organ of the assailant. Code 1972, § 97–3–65.

10. Rape ⇐51(2)

Evidence, including prosecutrix' testimony that defendant "turned me over and forced me to have sexual intercourse, what I mean by sexual intercourse is he forced his penis into my vagina," circumstances corroborating prosecutrix' testimony and other evidence, was sufficient to establish corpus delicti of crime of rape. Code 1972, § 97–3–65.

11. Criminal Law ⇐721(3)

If a prosecutor's statement can reasonably be construed by jury as a comment on accused's failure to testify, it would be immaterial that the prosecutor has intended to refer to a situation other than the trial-in-chief.

12. Criminal Law ⇐1144.10

Trial court would be assumed to have ruled correctly in refusing to grant mistrial in criminal proceeding on basis of contention that remark made by assistant prosecutor in closing argument was a comment on defendant's failure to testify where defense counsel did not preserve the closing argument for the record by bill of exceptions or otherwise.

13. Criminal Law ⇐665(7)

Permitting sheriff, who testified in criminal proceeding and who assertedly was the only law enforcement official available in the courtroom, to serve as a bailiff and remain in courtroom after witnesses had been placed "under the rule" was not abuse of discretion.

F. Kent Stribling, Dixon L. Pyles, Pyles & Tucker, Jackson, David R. Smith, Smith, Smith, Tate & Stuart, Poplarville, for appellant.

Bill Allain, Atty. Gen. by Mark A. Chinn, Sp. Asst. Atty. Gen., Jackson, for appellee.

En Banc.

PATTERSON, Chief Justice, for the Court:

In the Circuit Court of Pearl River County, Malcolm Joe Davis was tried and convicted of rape and sentenced to thirty years in the Mississippi Department of Corrections. Davis appeals, assigning several errors.

1. The failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI of the United States Constitution, aggravated his mental condition because the prolonged incarceration prior to his trial was unduly oppressive, maximized his anxiety and concern which accompanied the public accusation of the appellant, and greatly impaired his ability to defend himself.

2. The conduct of the trial judge amounted to an intrusion into the jury's fact finding role because it structured the verdict of guilty; it relieved the state of establishing "beyond a reasonable doubt" the charge against the defendant in the indictment; and it shifted to the defendant the burden of persuasion of his innocence.

3. The defendant's rights under Amendments VI and XIV of the Constitution of the United States and under MCA § 13–5–2 (1975) were violated by the failure of the state to select the special venire from a fair cross section of the population of Pearl River County.

4. The procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process guaranteed by Amendment V of the United States Constitution, of the right to the effective assistance of counsel in violation of Amendment VI of the United States Constitution, and of the protection afforded by the "Mississippi Criminal Rules of Circuit Court Practice."

5. Davis' right to a fair trial under Amendments V, VI, and XIV of the United States Constitution were abrogated by the trial court's actions:

(a) in refusing to grant a mistrial on the motion of the defendant when Mason Sistrunk, a witness for the state, purposely exhibited, displayed and exposed certain prejudicial objects to the jury before the objects were admitted into evidence; and, thereafter, when the state failed to offer the prejudicial objects into evidence, denying the defendant the right to cross-examine the witness and procure testimony favorable to the accused;

(b) in refusing to grant a mistrial when the assistant prosecutor was allowed over objection to argue and comment on the failure of the defendant to testify in his own behalf;

(c) in refusing to grant the motion of the defendant to dismiss and discharge him at the conclusion of the state's case when the proof of the elements of the corpus delicti were wholly lacking, and again refusing at the conclusion of the trial to dismiss and discharge the defendant;

(d) in refusing to sustain the objections of the defendant to certain testimony of the state, and in sustaining the objections of the state to the evidence of the defendant.

6. The court abused its discretion in permitting Sheriff L. W. Holliday to serve as a bailiff and remain in the courtroom to hear the testimony of other witnesses and mingle with the other witnesses in the witness room, and in permitting him to testify over the objection of the defendant after all witnesses had been placed "under the rule" at the outset of the trial.

The prosecutrix, on the morning of March 9, 1979, was raped, after a struggle, in her home by a man wearing knee-high stockings over his head and hands. After the rape the man led the prosecutrix into the bathroom and made her take a douche. After he left, the prosecutrix went to her husband's office and with him to the police. She identified her assailant in court as Malcolm Davis, a man who had been to her home to repair the washing machine on a previous occasion. There were witnesses who recalled seeing, just before the time of the rape, Malcolm Davis walking near the prosecutrix' home and his truck parked in the vicinity of the home. Four knee-high stockings were found under a bridge near the prosecutrix' house. The containers were found in Davis' truck. A checkout girl in a local market recalled selling the stockings to Davis a few days before the rape.

Davis was taken into custody about 1:50 p. m. on March 9, 1979. Although Davis was advised of his *Miranda* rights, he signed a waiver of those rights and requested counsel. Deputy Sistrunk phoned Davis' attorney and Davis conferred with him over the phone. Some interrogation was continued that afternoon, but no prejudicial or incriminating statements were obtained from Davis, although Deputy Sistrunk later testified at trial that at some time in the afternoon he encouraged Davis to cooperate. Sistrunk testified:

> . . . If you will talk to us, we'll cooperate with you every way we can, and I told him, I said, "Do you want a lawyer, there's the phone. I'm not going to be hostile to you in anyway." I have a tendency to talk boisterous to people. That's my nature, and a lot of people take me wrong in doing that, but I'm known to be loud, and I was possibly was loud with him. I'm always loud.
>
> . . . .

> ... I told him it would be best. It would make it lighter on yourself. I always feel that way.

At 11:00 p. m. on the same day, Sheriff Holliday and Auxiliary Deputy McCaleb talked with Davis when he was again advised of his rights and again signed a waiver of those rights. From this questioning, the sheriff obtained two signed statements from Davis admitting the rape. Sheriff Holliday testified that Davis did not make a request to contact his attorney, explaining as follows: "Whenever I read him his rights, and he signed that waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me at that time." Davis was indicted for rape on March 16, 1979, and arraigned on November 15, 1979. Trial began April 10, 1980.

Although Davis assigns numerous errors in the trial court, we are of the opinion only five of these errors warrant discussion as the remaining errors are believed to be without merit.

First, Davis contends the trial court failed to grant a speedy trial, violating his sixth amendment rights. Specifically, Davis asserts undue delay from the time of indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of trial, April 10, 1980.

On April 3, 1980, Davis filed a motion to dismiss the indictment based on the state's failure to bring him to trial within the 270 day time period of MCA § 99–17–1 (Supp. 1980). This motion was overruled because the delay was the result of continuances granted.

We are of the opinion there was no untimely delay between the arraignment and trial date. MCA § 99–17–1 (Supp.1980) provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."

[1] Since the time prior to arraignment is not computed to determine compliance with this statute and less than 150 days passed between the date of arraignment and the date of trial, we conclude the State adequately met the 270 day limitation as set forth in § 99–17–1. *See Speagle v. State*, 390 So.2d 990 (Miss.1980).

[2, 3] Moreover, the delay of 150 days is not unreasonable in view of the fact that the court below has two terms of criminal court each year, the March and November terms. Defendant cannot be heard to complain about the first continuance from the March 1979 to the November 1979 term because defense requested it to complete psychological tests of defendant. The State requested and was granted the continuance from the November 1979 term to the March 1980 term, so this delay was not incurred by the defendant; however, the continuance, in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there were no assistant district attorneys to try the case at this term. Although the appellant now contends that he objected to this continuance we are unable to find any support for it in the record. We, therefore, think both continuances were necessary and reasonable and within the sound discretion of the trial judge and surely not violative of MCA § 99–17–1 (Supp.1980), which permits continuances for good cause, as here.

[4, 5] Turning to the eight month delay from indictment to arraignment, Davis asserts it was the custom of the trial judge not to arraign criminal defendants unless they were to be tried at the term. Again there is no evidence of this in the record. We, therefore, are of the opinion the delay did not infringe on Davis' constitutional right to a speedy trial. We emphasize, however, the importance of early arraignment within a reasonable time. Although there is no evidence in the record to support the argument, the procedure of arraigning criminal defendants at the term set for trial, if true, has the potential to violate the defendant's right to a speedy trial through the four prong balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 101 (1972), and adopted in

Wells v. State, 288 So.2d 860, 862 (Miss. 1974), namely: "'[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

[6] Presently, on balance, we are unable to state there was error in not dismissing the indictment. Although there was some testimony that the appellant's incarceration contributed to both his mental and physical deterioration, it was not conclusive upon the trial judge as he had other factors to consider in conjunction with it, such as the appellant's physical appearance and demeanor, the testimony of the deputies and the sheriff as to the appellant's mental and physical condition. We, therefore, are of the opinion the appellant's right to a speedy trial was not violated.

[7] Davis also assigns as error the admission into evidence of the two signed confessions. There are two aspects of the admission of these statements which are troublesome, whether they were voluntarily given and whether there was an intelligent waiver of counsel.

The Pearl River County deputies and the sheriff testified in the suppression hearing concerning the arrest and questioning of Davis that no threats, coercion, or promise of reward was made to him. The trial judge ruled the confessions voluntary and thus admissible. After the suppression hearing and during the case-in-chief, Deputy Sistrunk stated on cross-examination by defense counsel that he had told Davis on the afternoon of March 9, 1979, that it would be best if he would cooperate, that it would be lighter for him. No objection to the introduction of the confession was made at that time based on the ground that, "it would make it lighter on yourself." The point was not raised until Davis moved for a new trial after the verdict.

In *Stubbs v. State*, 311 So.2d 339, 342 (Miss.1975), we stated "[t]he trial court correctly held after preliminary inquiry that the confession was competent evidence and in the absence of a motion to exclude during the course of the trial, the testimony of the appellant only went to the weight and credibility of the confession." In *Stubbs*, a police officer had testified at a preliminary hearing that the defendant made a voluntary confession without threat, promises, or inducement. The defendant offered no evidence to refute the voluntariness of the confession. Thus the trial court admitted the testimony concerning the statement into evidence. In the trial-in-chief the defendant testified that he had requested the presence of his attorney during the questioning in which he made the statement, and this request was denied. However, the defendant made no motion to exclude the testimony of the officer concerning the confession. This Court, finding no error in the admission of the confession at the hearing, held the defendant's testimony applicable only to the weight and credibility of the confession. Similarly, in this case, absent a contemporaneous motion to exclude during the trial, the objection to the admission of the confession was waived.

[8] Davis cites a recent U.S. Supreme Court case, *Edwards v. Arizona*, —— U.S. ——, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), as determinative of error in the admission of Davis' confessions. The *Edwards* case involved an oral confession of a man charged with murder. Edwards was arrested on January 19, 1976, and informed of his rights. After being told that another suspect had implicated him in the crime, Edwards indicated he wanted to "make a deal." After speaking briefly with the county attorney Edwards requested counsel. Questioning then ceased until the next morning when two detectives came to talk with Edwards. The jail guard informed him that the detectives wished to see him, but Edwards indicated that he did not want to talk to anyone. The guard then told Edwards that "he had" to talk with the detectives and took him to meet them. After the detectives read Edwards his rights, an oral confession was obtained from him. The U.S. Supreme Court held that Edwards had not made a valid waiver of his right to counsel, stating:

> ... and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further *police-initiated* custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication*, exchanges or conversations with the police. Id. at ——, 101 S.Ct. at 1884. (Emphasis added)

The circumstances in this case parallel rather closely the facts of *Edwards*, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in *Edwards* the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation. The officer telephoned Davis' attorney and permitted him to speak with the attorney. After talking with the attorney, Davis reported to the officer that the attorney would come to the sheriff's office that afternoon and confer with him; however, the attorney did not come to the sheriff's office that afternoon and did not confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in *Edwards*.

In *Edwards* the Court emphasized that "the voluntariness of ... an admission on the one hand, and a knowing and intelligent waiver on the other, are discreet inquiries." Id. at ——, 101 S.Ct. at 1884. The error in the *Edwards'* case, as we view it, lay in the state courts' failure to focus on whether Edwards intelligently and knowingly relinquished his right to counsel. Here the trial court in ruling on the motion to suppress made specific findings as to both voluntariness and knowing and intelligent relinquishment of rights.

The *Edwards* Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming and emphasizing the importance of the *Miranda* safeguards surrounding an accused's right to counsel. In considering the factual distinctions between these two cases it appears to us that *Edwards* is not presently controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by *Miranda* and *Edwards*. We, therefore, think this assignment of error is without merit.

Davis next contends he was denied a fair and impartial trial by the failure of the State to establish the corpus delicti of the crime. The crime of rape consists of a person having carnal knowledge of a woman over the age of 12, against her will. MCA § 97-3-65 (Supp.1980). Thus, it is necessary that both aspects of the act—carnal knowledge and force—be proved by the State.

The prosecutrix testified that the defendant after pulling a pillowcase over her head "turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina." This Court has stated "that the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances." *Dubose v.*

Mississippi, 320 So.2d 773, 774 (Miss.1975). The testimony of the prosecutrix was corroborated by witnesses who knew Davis and saw him, as well as his truck, in the vicinity of the prosecutrix' home at the time.

[9, 10] The prosecutrix also testified the sexual intercourse with Davis was against her will, stating that she struggled with him, was pushed to the floor, that she screamed, and was threatened with harm if she didn't cooperate. Although no signs of external injury or sperm were found, the presence of either is not considered absolutely determinative of rape. "The rule is that physical force on the part of the assailant, or physical resistance on the part of the victim, is not necessary if the proof shows beyond a reasonable doubt that the female surrendered because of fear arising out of a reasonable apprehension of great bodily harm." *Fields v. State*, 293 So.2d 430, 432 (Miss.1974). The testimony of the prosecutrix evidenced a reasonable apprehension of bodily harm. The examining physician testified that his examination was complicated by the douche and by menstrual bleeding. All that was necessary for the crime was "some penetration of the female's private parts by the sexual organ of the assailant." *Lang v. State*, 230 Miss. 147, 158, 87 So.2d 265, 268 (1956). The testimony of the prosecutrix, corroborated by the surrounding circumstances and other evidence, was sufficient, in our opinion, to prove the corpus delicti of the crime.

The appellant also contends there was reversible error because the trial court refused to grant a mistrial when the assistant prosecutor in the closing argument was allowed to comment on the failure of the defendant to testify in his own behalf. Since defense counsel did not preserve the closing argument for the record by a bill of exceptions or otherwise, we must assume the court's ruling in this regard correct. The trial court dictated into the record the following:

> Let the record show that the Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense. Upon him stating that, the defense attorneys have now moved the Court for a mistrial. The Court finds that the statements made by the Assistant District Attorney were made in regard to 9 March, '79, and in the early morning of 10 March, 1979, and in conjunction with the statements that were made to the Sheriff and the other witness at said time and place and were not in any manner referring to any other time, place, circumstance or situation; and for this reason, the motion be and the same is hereby overruled.

[11, 12] If the attorney's statement could reasonably be construed by the jury as a comment on Davis' failure to testify, then it would be immaterial that the attorney intended to refer to a situation other than the trial-in-chief. *Reddick v. State*, 72 Miss. 1008, 16 So. 490 (1895). Without the precise words of the argument or the context in which it was made, we have difficulty in determining a reasonable construction of the statement or in determining possible prejudicial effect on the jury's verdict. In this situation we must assume the trial court properly resolved the question as indicated by his above statements. In reaching this conclusion we note the testimony that Davis first denied his participation in the crime but later confessed, a fact which possibly evoked the comment. Nor do we have, as did the trial court, the benefit of defense counsel's argument which might have prompted the comment of the assistant district attorney in reply. In any event we have long declined to rule on matters not preserved in the record in sufficient detail for purposes of appeal. *Shelton v. Kindred*, 279 So.2d 642 (Miss.1973). Thus, we conclude this contention to be without merit.

[13] Finally the appellant contends that he was greatly prejudiced by the sheriff's presence in the courtroom after the rule had been invoked, particularly since the

sheriff was a witness in the case. While it is true that Davis objected to the sheriff's presence after the rule had been invoked, nevertheless the sheriff was exempted by the court because he was needed in the courtroom. The judge gave the following explanation:

> . . . [D]uring most of this trial, because of the other deputies being under the rule, the Sheriff has been the only law enforcement official in the Courtroom and available to the Court and has been performing his normal duties as Sheriff during the trial of this cause.

There is no suggestion by the defendant, as we view the record, that the sheriff acted with any impropriety, the only contention being that he must have heard the other witnesses testify; and therefore, we suppose, in some fashion not pointed out, either altered his testimony or by his very presence prejudiced the jury. We do not ascertain from our research of the record or from this argument that the trial judge in any way abused his discretion in permitting the sheriff to remain in the courtroom. *Fondren v. State*, 253 Miss. 241, 175 So.2d 628 (1965). The present factual situation does not rise to the proportions of those in *Dunn v. State*, 264 So.2d 823 (Miss.1972), *Perkins v. State*, 244 So.2d 414 (Miss.1971), or *Smith v. State*, 251 Miss. 241, 169 So.2d 451 (1964).

We have meticulously examined the other assignments of error and find them without merit. In sum, the record reveals sufficient credible evidence to support the jury's verdict and there being no prejudicial error in the record in our opinion, the cause is affirmed.

AFFIRMED.

SMITH, and ROBERTSON, P. JJ. and SUGG, WALKER, BROOM, LEE and BOWLING, JJ., concur.

HAWKINS, J., dissents.

HAWKINS, Justice, dissenting:

Respectfully, I must dissent.

Mississippi Code Annotated § 13-1-9 (1972) requires, and this Court has held in numerous decisions, that no comment whatsoever shall be made upon the defendant's failure to testify in a case. We have gone further and held no comment can be made which could be construed by the jury as a comment on failure by the accused to testify. *Brown v. State*, 340 So.2d 718 (Miss. 1976); *Lambert v. State*, 199 Miss. 790, 25 So.2d 477 (1946); *Reddick v. State*, 72 Miss. 1008, 16 So. 490 (1895).

As this Court stated in *Prince v. State*, 93 Miss. 263, 46 So. 537 (1908), the jury cannot avoid being keenly cognizant of the defendant's failure to testify, and the defendant being manifestly the one person most interested in the outcome of the case, the jury can only wonder why he did not testify. To make any kind of comment that can be construed as a statement to the jury as "Well, if he was not guilty, he could have denied it," can only result in serious prejudice to the defendant's statutory and Constitutional rights under the Fifth Amendment to the Constitution.

The Court stated in pertinent part:

> . . . The Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense.

For twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy. In my view, the statement by the assistant prosecutor can only be construed as a comment on the failure of the defendant to testify.

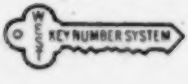
This Court has taken pains so often to warn and urge prosecuting attorneys to refrain from any comment of this nature. It is also probably true that most cases of this nature never reach this Court because the

trial judges as a rule declare a mistrial on the spot. That, at least, has been the experience of the author of this dissent, as a district attorney and an observer of criminal trials over the years. In this particular record, with the proof of the guilt of the defendant so strong, it was as strange as it was unnecessary to make the comment made by the state.

The learned trial judge in this case I am sure did everything possible to prevent the unfortunate inference being impressed upon the jurors' minds, but I think the inference inescapable and unavoidable.

I specially concur with the majority opinion relative to the confession of the defendant. Ordinarily, any statement made by a law enforcement officer to an accused, as was made in this case, that it would be better for him to cooperate and "it would be lighter for him," would taint the admission or confession and render it totally incompetent. Citation of authority is unnecessary to this well-settled proposition of law.

In this case, however, the revelation that such a promise had been made to the accused was first elicited from the officer during the trial by defense counsel on cross-examination. Yet, counsel made no objection, no motion to exclude the confession, and the first we learn of his taking umbrage from such disclosure was in the motion for a new trial. We can only assume defense counsel either approved or was unperturbed. To wait until the jury has returned a verdict of guilty before voicing any complaint was somewhat late, and the accused thereby clearly waived a definite right that he once had to object.



Jerry Curtis LEWIS

v.

Lela Earline Penton Lewis Mitchell NYBO.

No. 53030.

Supreme Court of Mississippi.

Dec. 2, 1981.

Appeal from Chancery Court, Pearl River County; Howard L. Patterson, Jr., Chancellor.

Cornelius J. Ladner, Bay St. Louis, for appellant.

Stewart, Burks & Pace, Delos H. Burks, Picayune, for appellee.

Before BROOM, LEE and HAWKINS, JJ.

AFFIRMED.

John FORYT

v.

SOUTHWEST MISSISSIPPI REGIONAL MEDICAL CENTER.

No. 52876-A.

Supreme Court of Mississippi.

Dec. 2, 1981.

Appeal from Circuit Court, Pike County; Joe N. Pigott, Judge.

T. Mack Brabham, McComb, for appellant.

Roach, McMillan, Welch & Ott, John Gordon Roach, Jr., McComb, Wise, Carter, Child & Caraway, George O. Evans and Douglas E. Levanway, Jackson, for appellee.

Before PATTERSON, C.J., and SUGG and LEE, JJ.

AFFIRMED.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

v.

STATE OF MISSISSIPPI

EN BANC

PATTERSON, CHIEF JUSTICE, FOR THE COURT:

In the Circuit Court of Pearl River County, Malcolm Joe Davis was tried and convicted of rape and sentenced to thirty years in the Mississippi Department of Corrections. Davis appeals, assigning several errors.

1. The failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI of the United States Constitution, aggravated his mental condition because the prolonged incarceration prior to his trial was unduly oppressive, maximized his anxiety and concern which accompanied the public accusation of the appellant, and greatly impaired his ability to defend himself.

2. The conduct of the trial judge amounted to an intrusion into the jury's fact finding role because it structured the verdict of guilty; it relieved the state of establishing "beyond a reasonable doubt" the charge against the defendant in the indictment; and it shifted to the defendant the burden of persuasion of his innocence.

3. The defendant's rights under Amendments VI and XIV of the Constitution of the United States and under MCA §15-5-2 (1975) were violated by the failure of the state to select the special venire from a fair cross section of the population of Pearl River County.

4. The procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process guaranteed by Amendment V of the United States Constitution, of the right to the effective assistance of counsel in violation of Amendment VI of the United States Constitution, and of the protection afforded by the "Mississippi Criminal Rules of Circuit Court Practice."

5. Davis' right to a fair trial under Amendments V, VI, and XIV of the United States Constitution were abrogated by the trial court's actions:

(a) in refusing to grant a mistrial on the motion of the defendant when Mason Sistrunk, a witness for the state, purposely exhibited, displayed and exposed certain prejudicial objects to the jury before the objects were admitted into evidence; and, thereafter, when the state failed to offer the prejudicial objects into evidence, denying the defendant the right to cross-examine the witness and procure testimony favorable to the accused;

(b) in refusing to grant a mistrial when the assistant prosecutor was allowed over objection to argue and comment on the failure of the defendant to testify in his own behalf;

(c) in refusing to grant the motion of the defendant to dismiss and discharge him at the conclusion of the state's case when the proof of the elements of the

corpus delicti were wholly lacking, and again refusing at the conclusion of the trial to dismiss and discharge the defendant,

(d) in refusing to sustain the objections of the defendant to certain testimony of the state, and in sustaining the objections of the state to the evidence of the defendant.

6. The court abused its discretion in permitting Sheriff L. W. Holliday to serve as a bailiff and remain in the courtroom to hear the testimony of other witnesses and mingle with the other witnesses in the witness room, and in permitting him to testify over the objection of the defendant after all witnesses had been placed "under the rule" at the outset of the trial.

The prosecutrix, on the morning of March 9, 1979, was raped, after a struggle, in her home by a man wearing knee-high stockings over his head and hands. After the rape the man led the prosecutrix into the bathroom and made her take a douche. After he left, the prosecutrix went to her husband's office and with him to the police. She identified her assailant in court as Malcolm Davis, a man who had been to her home to repair the washing machine on a previous occasion. There were witnesses who recalled seeing, just before the time of the rape, Malcolm Davis walking near the prosecutrix' home and his truck parked in the vicinity of the home. Four knee-high stockings were found under a bridge near the prosecutrix' house. The containers were found in Davis' truck. A checkout girl in a local market recalled selling the stockings to Davis a few days before the rape.

Davis was taken into custody about 1:50 p.m. on March 9, 1979. Although Davis was advised of his Miranda rights, he signed a waiver of those rights and requested counsel. Deputy

Sistrunk phoned Davis' attorney and Davis conferred with him over the phone. No interrogation occurred that afternoon, although Deputy Sistrunk later testified at trial that at some time in the afternoon he encouraged Davis to cooperate. Sistrunk testified:

> . . . If you will talk to us, we'll cooperate with you every way we can, and I told him, I said, "Do you want a lawyer, there's the phone. I'm not going to be hostile to you in anyway." I have a tendency to talk boisterous to people. That's my nature, and a lot of people take me wrong in doing that, but I'm known to be loud, and I was possibly was loud with him. I'm always loud.
> . . . .
> . . .I told him it would be best. It would make it lighter on yourself. I always feel that way.

At 11:00 p.m. on the same day, Sheriff Holliday and Auxiliary Deputy McCaleb talked with Davis when he was again advised of his rights and again signed a waiver of those rights. From this questioning, the sheriff obtained two signed statements from Davis admitting the rape. Sheriff Holliday testified that Davis did not make a request to contact his attorney, explaining as follows: "Whenever I read him his rights, and he signed that waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me at that time." Davis was indicted for rape on March 16, 1979, and arraigned on November 15, 1979. Trial began April 10, 1980.

Although Davis assigns numerous errors in the trial court, we are of the opinion only five of these errors warrant discussion as the remaining errors are believed to be without merit.

First, Davis contends the trial court failed to grant a speedy trial, violating his sixth amendment rights. Specifically, Davis asserts undue delay from the time of indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of trial, April 10, 1980.

On April 3, 1980, Davis filed a motion to dismiss the

indictment based on the state's failure to bring him to trial within the 270 day time period of MCA §99-17-1 (Supp. 1980). This motion was overruled because the delay was the result of continuances granted.

We are of the opinion there was no untimely delay between the arraignment and trial date. MCA §99-17-1 (Supp. 1980) provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."

Since the time prior to arraignment is not computed to determine compliance with this statute and less than 150 days passed between the date of arraignment and the date of trial, we conclude the State adequately met the 270 day limitation as set forth in §99-17-1. See Speagle v. State, 390 So. 2d 990 (Miss. 1980).

Moreover, the delay of 150 days is not unreasonable in view of the fact that the court below has two terms of criminal court each year, the March and November terms. Defendant cannot be heard to complain about the first continuance from the March 1979 to the November 1979 term because defense requested it to complete psychological tests of defendant. The State requested and was granted the continuance from the November 1979 term to the March 1980 term, so this delay was not incurred by the defendant; however, the continuance, in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there were no assistant district attorneys to try the case at this term. Although the appellant now contends that he objected to this continuance we are unable to find any support for it in the record. We, therefore, think both

continuances were necessary and reasonable and within the sound discretion of the trial judge and surely not violative of MCA §99-17-1 (Supp. 1980), which permits continuances for good cause, as here.

Turning to the eight month delay from indictment to arraignment, Davis asserts it was the custom of the trial judge not to arraign criminal defendants unless they were to be tried at the term. Again there is no evidence of this in the record. We, therefore, are of the opinion the delay did not infringe on Davis' constitutional right to a speedy trial. We emphasize, however, the importance of early arraignment within a reasonable time. Although there is no evidence in the record to support the argument, the procedure of arraigning criminal defendants at the term set for trial, if true, has the potential to violate the defendant's right to a speedy trial through the four prong balancing test set forth in Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 101 (1972), and adopted in Wells v. State, 288 So. 2d 860, 862 (Miss. 1974), namely: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

Presently, on balance, we are unable to state there was error in not dismissing the indictment. Although there was some testimony that the appellant's incarceration contributed to both his mental and physical deterioration, it was not conclusive upon the trial judge as he had other factors to consider in conjunction with it, such as the appellant's physical appearance and demeanor, the testimony of the deputies and the sheriff as to the appellant's mental and physical condition. We, therefore, are of the opinion the appellant's right to a speedy trial was not violated.

Davis also assigns as error the admission into evidence of the two signed confessions. There are two aspects of the admission of these statements which are troublesome, whether they were voluntarily given and whether there was an intelligent waiver of counsel.

The Pearl River County deputies and the sheriff testified in the suppression hearing concerning the arrest and questioning of Davis that no threats, coercion, or promise of reward was made to him. The trial judge ruled the confessions voluntary and thus admissible. After the suppression hearing and during the case-in-chief, Deputy Sistrunk stated on cross-examination by defense counsel that he had told Davis on the afternoon of March 9, 1979, that it would be best if he would cooperate, that it would be lighter for him. No contemporaneous motion to renew the motion to suppress was made nor was there any motion made at the close of the evidence. The point was not raised until Davis moved for a new trial after the verdict.

In Stubbs v. State, 311 So. 2d 339, 342 (Miss. 1975), we stated "[t]he trial court correctly held after preliminary inquiry that the confession was competent evidence and in the absence of a motion to exclude during the course of the trial, the testimony of the appellant only went to the weight and credibility of the confession." In Stubbs, a police officer had testified at a preliminary hearing that the defendant made a voluntary confession without threat, promises, or inducement. The defendant offered no evidence to refute the voluntariness of the confession. Thus the trial court admitted the testimony concerning the statement into evidence. In the trial-in-chief the defendant testified that he had requested the presence of his attorney during the questioning in which he made the statement, and this

request was denied. However, the defendant made no motion to exclude the testimony of the officer concerning the confession. This Court, finding no error in the admission of the confession at the hearing, held the defendant's testimony applicable only to the weight and credibility of the confession. Similarly, in this case, absent a contemporaneous motion to exclude during the trial, the objection to the admission of the confession was waived.

Davis cites a recent U. S. Supreme Court case, Edwards v. Arizona, 49 L. Week 4498 (May 19, 1981), as determinative of error in the admission of Davis' confessions. The Edwards case involved an oral confession of a man charged with murder. Edwards was arrested on January 19, 1976, and informed of his rights. After being told that another suspect had implicated him in the crime, Edwards indicated he wanted to "make a deal." After speaking briefly with the county attorney Edwards requested counsel. Questioning then ceased until the next morning when two detectives came to talk with Edwards. The jail guard informed him that the detectives wished to see him, but Edwards indicated that he did not want to talk to anyone. The guard then told Edwards that "he had" to talk with the detectives and took him to meet them. After the detectives read Edwards his rights, an oral confession was obtained from him. The U. S. Supreme Court held that Edwards had not made a valid waiver of his right to counsel, stating:

> . . . and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not

> subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. Id. at 4498. (Emphasis added)

The circumstances in this case parallel rather closely the facts of Edwards, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in Edwards the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation when the deputies phoned Davis' attorney and allowed Davis to talk with him, after which the interrogation ceased. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them, indicating a willingness to talk. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in Edwards.

In Edwards the Court emphasized that "the voluntariness of . . . an admission on the one hand, and a knowing and intelligent waiver on the other, are discreet inquiries." Id. at 4497. The error in the Edwards' case, as we view it, lay in the state courts' failure to focus on whether Edwards intelligently and knowingly relinquished his right to counsel. Here the trial court in ruling on the motion to suppress made specific findings as to both voluntariness and knowing and intelligent relinquishment of rights.

The Edwards Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming

and emphasizing the importance of the Miranda safeguards surrounding an accused's right to counsel. In considering the factual distinctions between these two cases it appears to us that Edwards is not presently controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by Miranda and Edwards. We, therefore, think this assignment of error is without merit.

Davis next contends he was denied a fair and impartial trial by the failure of the State to establish the corpus delicti of the crime. The crime of rape consists of a person having carnal knowledge of a woman over the age of 12, against her will. MCA §97-3-65 (Supp. 1980). Thus, it is necessary that both aspects of the act - carnal knowledge and force - be proved by the State.

The prosecutrix testified that the defendant after pulling a pillowcase over her head "turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina." This Court has stated "that the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances." Dubose v. Mississippi, 320 So. 2d 773, 774 (Miss. 1975). The testimony of the prosecutrix was corroborated by witnesses who knew Davis and saw him, as well as his truck, in the vicinity of the prosecutrix' home at the time.

The prosecutrix also testified the sexual intercourse with Davis was against her will, stating that she struggled with him, was pushed to the floor, that she screamed, and was threatened with harm if she didn't cooperate. Although no signs of external injury or sperm were found, the presence of either

is not considered absolutely determinative of rape. "The rule is that physical force on the part of the assailant, or physical resistance on the part of the victim, is not necessary if the proof shows beyond a reasonable doubt that the female surrendered because of fear arising out of a reasonable apprehension of great bodily harm." Fields v. State, 293 So. 2d 430, 432 (Miss. 1974). The testimony of the prosecutrix evidenced a reasonable apprehension of bodily harm. The examining physician testified that his examination was complicated by the douche and by menstrual bleeding. All that was necessary for the crime was "some penetration of the female's private parts by the sexual organ of the assailant." Lang v. State, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956). The testimony of the prosecutrix, corroborated by the surrounding circumstances and other evidence, was sufficient, in our opinion, to prove the corpus delicti of the crime.

The appellant also contends there was reversible error because the trial court refused to grant a mistrial when the assistant prosecutor in the closing argument was allowed to comment on the failure of the defendant to testify in his own behalf. Since defense counsel did not preserve the closing argument for the record by a bill of exceptions or otherwise, we must assume the court's ruling in this regard correct. The trial court dictated into the record the following:

> Let the record show that the Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense. Upon him stating that, the defense attorneys have now moved the Court for a mistrial. The Court finds that the statements made by the Assistant District Attorney were made in regard to 9 March, '79, and in the early morning of 10 March, 1979, and in conjunction with the

> statements that were made to the Sheriff and the other witness at said time and place and were not in any manner referring to any other time, place, circumstance or situation, and for this reason, the motion be and the same is hereby overruled.

If the attorney's statement could reasonably be construed by the jury as a comment on Davis' failure to testify, then it would be immaterial that the attorney intended to refer to a situation other than the trial-in-chief. Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895). Without the precise words of the argument or the context in which it was made, we have difficulty in determining a reasonable construction of the statement or in determining possible prejudicial effect on the jury's verdict. In this situation we must assume the trial court properly resolved the question as indicated by his above statements. In reaching this conclusion we note the testimony that Davis first denied his participation in the crime but later confessed, a fact which possibly evoked the comment. Nor do we have, as did the trial court, the benefit of defense counsel's argument which might have prompted the comment of the assistant district attorney in reply. In any event we have long declined to rule on matters not preserved in the record in sufficient detail for purposes of appeal. Shelton v. Kindred, 279 So. 2d 642 (Miss. 1973). Thus, we conclude this contention to be without merit.

Finally the appellant contends that he was greatly prejudiced by the sheriff's presence in the courtroom after the rule had been invoked, particularly since the sheriff was a witness in the case. While it is true that Davis objected to the sheriff's presence after the rule had been invoked, nevertheless the sheriff was exempted by the court because he was needed in the courtroom. The judge gave the following explanation:

> . . . [D]uring most of this trial, because of the other deputies being under the rule, the Sheriff has been the only law enforcement official

in the Courtroom and available to the Court and has been performing his normal duties as Sheriff during the trial of this cause.

There is no suggestion by the defendant, as we view the record, that the sheriff acted with any impropriety, the only contention being that he must have heard the other witnesses testify; and therefore, we suppose, in some fashion not pointed out, either altered his testimony or by his very presence prejudiced the jury. We do not ascertain from our research of the record or from this argument that the trial judge in any way abused his discretion in permitting the sheriff to remain in the courtroom. Fondren v. State, 253 Miss. 241, 175 So. 2d 628 (1965). The present factual situation does not rise to the proportions of those in Dunn v. State, 264 So. 2d 823 (Miss. 1972), Perkins v. State, 244 So. 2d 414 (Miss. 1971), or Smith v. State, 251 Miss. 241, 169 So. 2d 451 (1964).

We have meticulously examined the other assignments of error and find them without merit. In sum, the record reveals sufficient credible evidence to support the jury's verdict and there being no prejudicial error in the record in our opinion, the cause is affirmed.

AFFIRMED.

SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, LEE AND BOWLING, JJ., CONCUR. HAWKINS, J., DISSENTS.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

V.

STATE OF MISSISSIPPI

HAWKINS, JUSTICE, DISSENTING:

Respectfully, I must dissent.

Mississippi Code Annotated § 13-1-9 (1972) requires, and this Court has held in numerous decisions, that no comment whatsoever shall be made upon the defendant's failure to testify in a case. We have gone further and held no comment can be made which could be construed by the jury as a comment on failure by the accused to testify. Brown v. State, 340 So. 2d 718 (Miss. 1976); Lambert v. State, 199 Miss. 790, 25 So. 2d 477 (1946); Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895).

As this Court stated in Prince v. State, 93 Miss. 263, 46 So. 537 (1908), the jury cannot avoid being keenly cognizant of the defendant's failure to testify, and the defendant being manifestly the one person most interested in the outcome of the case, the jury can only wonder why he did not testify. To make any kind of comment that can be construed as a statement to the jury as "Well, if he was not guilty, he could have denied it," can only result in serious prejudice to the defendant's statutory and Constitutional rights under the Fifth Amendment to the Constitution.

The Court stated in pertinent part:

> . . .The Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he had committed the offense.

For twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy. In my view, the statement by the assistant prosecutor can only be construed as a comment on the failure of the defendant to testify.

This Court has taken pains so often to warn and urge prosecuting attorneys to refrain from any comment of this nature. It is also probably true that most cases of this nature never reach this Court because the trial judges as a rule declare a mistrial on the spot. That, at least, has been the experience of the author of this dissent, as a district attorney and an observer of criminal trials over the years. In this particular record, with the proof of the guilt of the defendant so strong, it was as strange as it was unnecessary to make the comment made by the state.

The learned trial judge in this case I am sure did everything possible to prevent the unfortunate inference being impressed upon the jurors' minds, but I think the inference inescapable and unavoidable.

I specially concur with the majority opinion relative to the confession of the defendant. Ordinarily, any statement made by a law enforcement officer to an accused, as was made in this case, that it would be better for him to cooperate and "it would be lighter for him," would taint the admission or confession and render it totally incompetent. Citation of authority is unnecessary to this well-settled proposition of law.

In this case, however, the revelation that such a promise had been made to the accused was first elicited from the officer during the trial by defense counsel on cross-examination. Yet, counsel made no objection, no motion to exclude the confession, and the first we learn of his taking umbrage from such disclosure was in the motion for a new trial. We can only assume defense counsel either approved or was unperturbed. To wait until the jury has returned a verdict of guilty before voicing any complaint was somewhat late, and the accused thereby clearly waived a definite right that he once had to object.

IC

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From The Office Of:

ROBERT E. WOMACK
Supreme Court Clerk
3rd Floor, Gartin Bldg.
Jackson, Miss. 39202

December 16, 1981

RE: MALCOLM JOE DAVIS V. STATE
#52,659

TO: WHOM IT MAY CONCERN

The Court this date denied the petition for rehearing in this case. However, the opinion previously rendered on 9-9-81 as written by Chief Justice Patterson has been modified as of this date. Attached are copies of corrected pages 4, 7, 9 & 10. Please see that same are substituted into the copy of the opinion furnished you as of 9-9-81.

lp

Sistrunk phoned Davis' attorney and Davis conferred with him over the phone. Some interrogation was continued that afternoon but no prejudicial or incriminating statements were obtained from Davis, although Deputy Sistrunk later testified at trial that at some time in the afternoon he encouraged Davis to cooperate. Sistrunk testified:

> . . .If you will talk to us, we'll cooperate with you every way we can, and I told him, I said, "Do you want a lawyer, there's the phone. I'm not going to be hostile to you in anyway." I have a tendency to talk boisterous to people. That's my nature, and a lot of people take me wrong in doing that, but I'm known to be loud, and I was possibly was loud with him. I'm always loud.
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>
> . . .I told him it would be best. It would make it lighter on yourself. I always feel that way.

At 11:00 p.m. on the same day, Sheriff Holliday and Auxiliary Deputy McCaleb talked with Davis when he was again advised of his rights and again signed a wiaver of those rights. From this questioning, the sheriff obtained two signed statements from Davis admitting the rape. Sheriff Holliday testified that Davis did not make a request to contact his attorney, explaining as follows: "Whenever I read him his rights, and he signed that waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me at that time." Davis was indicted for rape on March 16, 1979, and arraigned on November 15, 1979. Trial began April 10, 1980.

Although Davis assigns numerous errors in the trial court, we are of the opinion only five of these errors warrant discussion as the remaining errors are believed to be without merit.

First, Davis contends the trial court failed to grant a speedy trial, violating his sixth amendment rights. Specifically, Davis asserts undue delay from the time of indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of trial, April 10, 1980.

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The Pearl River County deputies and the sheriff testified in the suppression hearing concerning the arrest and questioning of Davis that no threats, coercion, or promise of reward was made to him. The trial judge ruled the confessions voluntary and thus admissible. After the suppression hearing and during the case-in-chief, Deputy Sistrunk stated on cross-examination by defense counsel that he had told Davis on the afternoon of March 9, 1979, that it would be best if he would cooperate, that it would be lighter for him. No objection to the introduction of the confession was made at that time based on the ground that, "it would make it lighter on yourself." The point was not raised until Davis moved for a new trial after the verdict.

In Stubbs v. State, 311 So. 2d 339, 342 (Miss. 1975), we stated "[t]he trial court correctly held after preliminary inquiry that the confession was competent evidence and in the absence of a motion to exclude during the course of the trial, the testimony of the appellant only went to the weight and credibility of the confession." In Stubbs, a police officer had testified at a preliminary hearing that the defendant made a voluntary confession without threat, promises, or inducement. The defendant offered no evidence to refute the voluntariness of the confession. Thus the trial court admitted the testimony concerning the statement into evidence. In the trial-in-chief the defendant testified that he had requested the presence of his attorney during the questioning in which he made the statement, and this

> subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. Id. at 4498. (Emphasis added)

The circumstances in this case parallel rather closely the facts of Edwards, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in Edwards the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation. The officer telephoned Davis' attorney and permitted him to speak with the attorney. After talking with the attorney, Davis reported to the officer that the attorney would come to the sheriff's office that afternoon and confer with him; however, the attorney did not come to the sheriff's office that afternoon and did not confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in Edwards.

In Edwards the Court emphasized that "the voluntariness of . . . an admission on the one hand, and a knowing and intelligent waiver on the other, are discreet inquiries." Id. at 4497. The error in the Edwards' case, as we view it, lay in the state courts' failure to focus on whether Edwards intelligently and knowingly relinquished his right to counsel. Here the trial court in ruling on the motion to suppress made specific findings

as to both voluntariness and knowing and intelligent relinquishment of rights.

The Edwards Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming and emphasizing the importance of the Miranda safeguards surrounding an accused's right to counsel. In considering the factual distinction between these two cases it appears to us that Edwards is not presently controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by Miranda and Edwards. We, therefore, think this assignment of error is without merit.

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The prosecutrix testified that the defendant after pulling a pillowcase over her head "turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina." This Court has stated "that the testimony of the victim of a rape may be sufficient to support a guilty verdict where the victim's testimony is neither contradicted nor discredited by other evidence or by surrounding circumstances." Dubose v. Mississippi, 320 So. 2d 773, 774 (Miss. 1975). The testimony of the prosecutrix was corroborated by witnesses who knew Davis and saw him, as well as his truck, in the vicinity of the prosecutrix' home at the time.

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

APPELLANT

V.

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APPELLEE

PETITION FOR REHEARING

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

PETITION FOR REHEARING
(Oral Argument Requested)

Malcolm Joe Davis, appellant, petitions the court for a rehearing of his appeal to correct the erroneous statements of facts and conclusions of law in the opinion of the court released September 9, 1981. Following the rehearing, Davis requests the court to withdraw the present opinion, render a decision which reverses the judgment of the Pearl River Circuit Court; vacates the sentence, dismisses the indictment and discharges the appellant. As grounds, the appellant assigns the following errors of fact and of law;

1. The court erroneously stated (p. 3) that four knee high stockings were found under the bridge and that the containers were found in Davis' truck after the law enforcement officer "gained permission to look in Malcolm's truck". No knee high stockings were found under the bridge nor were any knee high containers found in Davis' truck.

2. The court ignored the facts that the prosecutrix:

(a) On March 9, 1981, signed a John Doe affidavit signifying she did not know the identity of the assailant;

(b) failed to point out Davis as her assailant in front of her husband's office on March 9, 1981, although she said at the trial that she saw and recognized him;

(c) failed to call attention of the law enforcement officer that Davis was her assailant although she said at the trial she saw him outside of the hospital on March 9, 1979.

3. Contrary to the statements in the opinion of the court that: "No interrogation occurred that afternoon" (p. 4) and "yet here Davis request for counsel was immediately complied with during the afternoon interrogation when the deputies phoned Davis' attorney and allowed Davis to talk with him, after which the interrogation ceased," (p. 9) the evidence is conclusive that law enforcement officers Mason Sistrunk, Hooper Farmer, Joe McCaleb and Ulmer Lumpkin (R 642) continuously interrogated Davis from 2:00 p.m., the time Davis expressed his desire to deal with the officers only through counsel, until 6:00 p.m., and from 11:00 p.m. to 2:00 a.m. on March 10, 1979, although counsel was never present nor available to him during the seven hour period of interrogation.

4. The Mississippi Supreme Court erroneously gave a strained effect to the procedural "contemporaneous objection" rule; chose to depart from its prior holdings; applied a stricter rule against the appellant; ignored the fundamental and constitutional rights of Davis; and denied him "due process." The holding that "absent a contemporaneous motion to exclude during the trial, the objection to the admission of the confession was waived," gives "effect to the contemporaneous-objection rule for its own sake" and forces "resort to an arid ritual of meaningless form." The law conclusively presumes that Davis was influenced to confess as a result of the inducement held out by Sistrunk, a person in authority, and the Mississippi Supreme Court should have held that the confessions should have been excluded by the trial court on the grounds of public policy. Davis' constitutional rights in this serious criminal case rises above mere rules of procedure. Factors affecting Davis' fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal.

5. The Mississippi Supreme Court misapplied the requirements of Miranda v. Arizona, 384 U. S. 346, 86 S. Ct. 1602, 16 L Ed 2d 694, and Edwards v. Arizona, ____ U. S. ____, 101 S.Ct. 1880, 68 L Ed 2d 378, because the use of Davis' two confessions against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. Having exercised his right at 2:00 p.m. on March 9, 1979, to have counsel present during interrogation Davis did not waive that right during the interrogation that began at 11:00 p.m. and concluded at 2:00 a.m. on March 10, 1979. Rule 6, Miss. Sup. Ct. Rules provides ... "the Court may, at its option, notice a plain error ..." .

6. The Mississippi Supreme Court and the Pearl River Circuit Court applied an erroneous standard for determing Davis' alleged waiver of his right to counsel by focusing on the voluntariness of the two confessions rather than on whether the appellant understood his right to counsel and intelligently relinquished it.

7. Davis' rights under Amendments V and XIV to the Constitution of the United States were also violated by the Mississippi Supreme Court in its decision dated September 9, 1981, wherein it held that nine hours after the appellant expressed his desire to deal with the law enforcement officers only through counsel, the sheriff and a deputy again initiated a three hour period of interrogation and obtained two confessions from him despite the fact that Davis' counsel had never been present during any of the seven hours of questioning conducted by five different law enforcement officers. Davis stated at 2:00 p.m. on March 9, 1979, that he wished to remain silent; that he wanted his attorney present, and that his attorney was coming to Picayune. When Davis said he did not want to talk about the rape and requested counsel, he had the right to have counsel present and with him during any and all subsequent "interrogation."

8. In the September 9, 1981, decision the Mississippi Supreme Court erred in holding that the State established the corpus delicti of rape when there was not a scintilla of evidence in the record to suggest that the prosecutrix was in fear of great bodily harm and that such fear motivated her not to continue to physically resist or that she resisted to the utmost within her power and ability.

9. The Mississippi Supreme Court erred in the September 9, 1981, decision (pp. 12, 13) in:

(a) refusing to hold that the argument of the assistant prosecutor, as stated by the trial judge, "That all the defendant had to do at that time was to deny he committed the offense," violated Davis' rights pursuant to Amendment V and Mississippi Code 1972 Annotated (MCA) § 13-1-19;

(b) justifying the comment by speculating that Davis' denial of his participation in the crime and his later confessions of the rape possibly evoked the comment;

(c) conjecturing that "defense counsel's argument ... might have prompted the comment of the assistant district attorney in reply." (p. 12) The assistant prosecutor made the statements in the opening arguments to the jury before defense counsel made any argument.

(d) failing to reverse and remand the case on this ground alone.

10. The Mississippi Supreme Court erred in the September 9, 1981, decision in:

(a) refusing to hold that the delay of 399 days between Davis' arrest and the beginning of his trial violated his Sixth Amendment rights to a speedy trial.

(b) failing to hold that MCA § 99-17-1, under the circumstances existing in this case is unconstitutional on its face and as applied.

(c) holding that the failure of Pearl River County to have a prosecuting attorney available at the November, 1979,

term in a timely manner justified a continuance "for good cause," (p. 6)

(d) refusing to hold that the delay of 399 days between arrest and trial gave prima facie merit to Davis' challenge to the lack of a speedy trial;

(e) refusing to hold from the uncontradicted evidence of the psychological expert that Davis' incarceration contributed to "his mental and physical condition" and in accepting the lay testimony of the law enforcement officers elicited by leading questions that the appellant appeared "normal;"

11. The Mississippi Supreme Court erred in the decision dated September 9, 1981:

(a) in refusing to consider that the excessive and inaccurate comments of the trial judge in the hearing of the jury was a form of evidence which changed the factual matrix within which the jury customarily operates and insured a verdict of guilty;

(b) in refusing to consider and find that the State failed to discharge its affirmative duty to provide Davis a special venire composed of a representative cross section of Pearl River County;

(c) in refusing to consider and find that Davis was prejudiced by the display before the jury of articles not thereafter introduced into evidence, and that the record presents circumstances of bad faith and prejudicial misconduct.

Dated: October 8, 1981.

Respectfully submitted,

MALCOLM JOE DAVIS - APPELLANT - PETITIONER

By _____
Of Counsel

By _____
Of Counsel

F. Kent Stribling
309 Barnett Bldg.
Jackson, MS. 39201

David R. Smith
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Dixon L. Pyles
Pyles & Tucker
507 E. Pearl St.
Jackson, MS. 39201

Attorneys for Appellant-Petitioner

CERTIFICATE

The undersigned hereby certifies that on the date set forth hereinafter a true copy of the foregoing Petition For Rehearing was personally delivered to:

Honorable Bill Allain
Attorney General of Mississippi
Gartin Building
Jackson, Mississippi

Dated: October 8, 1981.

DIXON L. PYLES

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. 4839

MALCOM DAVIS

MOTION TO DISMISS INDICTMENT

Comes now the Defendant, Malcom J. Davis, by his attorneys of record, and respectfully moves the Court to dismiss the indictment in the above styled and numbered cause returned against him by the grand jury of Pearl River County, Mississippi, at the March 1979 term of the Circuit Court thereof, and in support of said motion respectfully shows unto the court as follows, to-wit:

1. That the defendant, Malcom Joe Davis, was indicted by the grand jury of Pearl River County for rape on March 9, 1979, and was served with a capias and copy of the indictment on March 16, 1979. That his case was set for call before this honorable court on March 26, 1979. That said defendant has been in the lawful custody of Pearl River County, Mississippi, from the date of his arrest on March 9, 1979, until the present time.

2. That Section 99-17-1 of the Mississippi Code of 1972, as annotated and amended, provides that unless good cause be shown and continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

3. That more than two hundred seventy (270) days have passed from the time of the first appearance of the defendant on March 26, 1979, and the failure to bring the defendant to trial within said time denies the defendant his constitutional rights to a speedy trial as provided by Amendment Six and Fourteen of the Constitution of the United

States and the laws of the state of Mississippi applicable thereto.

4. That Pearl River County Circuit Court has five terms of court: second Monday of March; second Monday of April; third Monday of June; third Monday of September; and the first Monday of November. Therefore, under the Sixth and Fourteenth Amendments of the Constitution of the United States, as a matter of due process of law, guaranteed to him by said Constitution of the United States, the defendant has been deprived of his right to a speedy trial, while being detained in jail without bail.

And this indictment should be dismissed and Appellant discharged according to the ruling of the Supreme Court of Mississippi in Payne vs. State, 363 So. 2d 278.

WHEREFORE, the defendant respectfully moves the Court to hear this motion prior to the trial of this case on the merits and that at the conclusion of the testimony, the court will order the indictment dismissed as provided by Section 99-17-1 of the Mississippi Code of 1972, as amended, and the Sixth and Fourteenth Amendments of the Constitution of the United States.

RESPECTFULLY SUBMITTED,

BY: _____
Of Counsel

DIXON L. PYLES
507 East Pearl Street
Jackson, Mississippi 39201

DAVID SMITH
SMITH, SMITH, TATE & STUART
P. O. Box 393
Poplarville, Mississippi 39470

F. KENT STRIBLING
309 Barnett Building
Jackson, Mississippi 39201

CERTIFICATE

I, one of the attorneys representing the Defendant herein, do hereby certify that I have on this day, mailed, postage prepaid, a true and correct copy of the foregoing

SE

Motion to Dismiss Indictment to Honorable Philip Stingley, District Attorney, Post Office Box 642, Columbia, Mississippi 39429.

This the _____ day of _____, 1980.

_____
ATTORNEY FOR DEFENDANT

THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS ON APRIL 7, 1980.

BY THE COURT:

All right, first, this cause coming on to be heard first on stipulation between the State of Mississippi and counsels for the defendant, the State of Mississippi by and through the District Attorney, Philip Singley and the defense by and through the attorneys of record, Dixon L. Pyles, David R. Smith and F. Kent Stribling, and both the State and the defense agreeing to waive the two attorney per side participation in the trial in this cause and allowing each side to use three attorneys as active participates in the trial of this matter. Those attorneys to be, for the State of Mississippi, Honorable Philip Singley, District Attorney of the 15th Judicial District, Honorable Richard Douglass, Assistant District Attorney of the 15th Judicial District and Honorable Claiborne McDonald, III, County Attorney of Pearl River County, Mississippi. The three attorneys participating for the defense will be Honorable Dixon L. Pyles, Honorable David R. Smith and Honorable F. Kent Stribling.

Now, the next matter coming on before the Court and all parties having agreed that all motions heretofore filed have been disposed of by order of the Court except as to the Motion to Suppress Confessions and or oral Statements of the Defendant, and the State, the Defense and the Court all agree that those motions will be taken up during the trial and in the absense of the jury. That before the Court is the motion to dismiss this indictment; that the State of Mississippi and the Defense agree that there are certain items and allegations setout

in said motion that are inadvertently incorrect and that the Court will now take the motion paragraph by paragraph and state the facts as the Court docket and the Court file reflect them to be and at the conclusion of this statement, the Court will then rule on the motion as stated into the record by the Court.

Now, as to Paragraph 1 of said motion, the indictment in this cause shows that said indictment was returned on the 16th day of March, 1979, and that Malcolm Joe Davis was served with a copy of said indictment and capias on March the 16th, 1979; that the Court does find that his case was set for call during the March, 1979 Term of this Court which began on the 2nd Monday of March, 1979, and was for a period of seven weeks; that the Court finds that during said term, and being on the 25th day of April, 1979, there was filed in this cause a motion for continuance by Malcolm Davis, by and through David R. Smith, one of his attorneys of record; that said motion states that pursuant to motions and orders of this Court, the Defendant had been transferred to Hines County and ordered to undergo psychiatric and polygraph examinations by examiners of Defendant's own choosing; that said motions showed that said examinations were not completed in the time contemplated and that further time was needed to complete the examinations and testing and a continuance was necessary; that on the 26th day of April, 1979, by order of this Court, the continuance was granted and this cause was continued to the next term of this Court, the same being the November, 1979 Term. All as reflected and setout in said order granting continuance; that subsequent to said continuance and during the month of August and

September, 1979, there were motions and orders filed for additional psychiatric examinations of the defendant at the request of the defendant and by the doctor of defendant's choosing. At the November, 1979 Term of this Court, there was filed on November the 13th, 1979, a motion for continuance by the State of Mississippi; that said motion asking for a continuance of this cause until the next regular term of this Court and as basis for said motion, the State showed that the Grand Jury at the November, 1979 Term met, and the Court records will reflect; that said Grand Jury met the entire three weeks of said Court term; that during the November, 1979 term, there were no assistant district attorneys in the 15th Judicial District and that Honorable Richard Douglass having been appointed Assistant District Attorney pursuant to statue effective January the 1st of 1980, and that no assistant district attorneys were provided for prior to January 1, 1980; that because the District Attorney's presence was required to be with the Grand Jury during the entire three weeks of the November, 1979 Term, there were no criminal cases tried during said term, and the State was granted a continuance as shown by order entered herein on November the 13th, 1979.

Let the record further show that said motion was sustained by the Court and so shows on the Court docket; that through inadvertence or oversight, the Court was not furnished with a written order sustaining said motion, although the District Attorney has the original in his possession at this time and counsel for the defendant agree that the State was entitled to having entered a written order, at that the same was not entered either through

in said motion that are inadvertently incorrect and that the Court will now take the motion paragraph by paragraph and state the facts as the Court docket and the Court file reflect them to be and at the conclusion of this statement, the Court will then rule on the motion as stated into the record by the Court.

Now, as to Paragraph 1 of said motion, the indictment in this cause shows that said indictment was returned on the 16th day of March, 1979, and that Malcolm Joe Davis was served with a copy of said indictment and capias on March the 16th, 1979; that the Court does find that his case was set for call during the March, 1979 Term of this Court which began on the 2nd Monday of March, 1979, and was for a period of seven weeks; that the Court finds that during said term, and being on the 25th day of April, 1979, there was filed in this cause a motion for continuance by Malcolm Davis, by and through David R. Smith, one of his attorneys of record; that said motion states that pursuant to motions and orders of this Court, the Defendant had been transferred to Hines County and ordered to undergo psychiatric and polygraph examinations by examiners of Defendant's own choosing; that said motions showed that said examinations were not completed in the time contemplated and that further time was needed to complete the examinations and testing and a continuance was necessary; that on the 26th day of April, 1979, by order of this Court, the continuance was granted and this cause was continued to the next term of this Court, the same being the November, 1979 Term. All as reflected and setout in said order granting continuance; that subsequent to said continuance and during the month of August and

September, 1979, there were motions and orders filed for additional psychiatric examinations of the defendant, at the request of the defendant and by the doctor of defendant's choosing. At the November, 1979 Term of this Court, there was filed on November the 13th, 1979, a motion for continuance by the State of Mississippi; that said motion asking for a continuance of this cause until the next regular term of this Court and as basis for said motion, the State showed that the Grand Jury at the November, 1979 Term met, and the Court records will reflect; that said Grand Jury met the entire three weeks of said Court term; that during the November, 1979 term, there were no assistant district attorneys in the 15th Judicial District and that Honorable Richard Douglass having been appointed Assistant District Attorney pursuant to statue effective January the 1st of 1980, and that no assistant district attorneys were provided for prior to January 1, 1980; that because the District Attorney's presence was required to be with the Grand Jury during the entire three weeks of the November, 1979 Term, there were no criminal cases tried during said term, and the State was granted a continuance as shown by order entered herein on November the 13th, 1979.

Let the record further show that said motion was sustained by the Court and so shows on the Court docket; that through inadvertence or oversight, the Court was not furnished with a written order sustaining said motion, although the District Attorney has the original in his possession at this time and counsel for the defendant agree that the State was entitled to having entered a written order, at that the same was not entered either through

oversight or inadvertence..

All right, as to Paragraph 2 of said motion to dismiss the indictment, Section 99-17-1 of the Mississippi Code of 1972, will be taken and considered by the Court as written.

All right, Paragraph 3, in addition to the matters alleged in Paragraph 3 and in order to complete the motion, let that paragraph also show that this defendant was arraigned on November the 15th, 1979, and this was the first time that the Court was requested by the defendant or defendant's counsel for an arraignment, and that the Court did arraigne said defendant at the request of his counsel the first time the Court was apprised of the defendant's desire to be arraigned.

As to Paragraph 4 of said motion, let the record show that Pearl River County Circuit Court has two criminal terms of Court; the same being the 2nd Monday of March for seven weeks and the other term being the 1st Monday of November for three weeks; that Pearl River County, since March Term of 1979, has not had an April Term of Court as the same was combined with the then existing March Term to make the seven week term that now commenses on the 2nd Monday of March; that the June and September are each two week terms of Court and each specified by statue to be for civil business only; that the facts of this case are that the defendant was indicted at the March, 1979 Term and upon his motion for continuance being granted, that motion and in the order granting the motion, show that said cause was continued to the November, 1979 Term; that upon the State's motion for a continuance, this cause was

continued to the March, 1980 Term of the Pearl River County Circuit Court; that only one criminal term of the Pearl River County Circuit Court has intervened since the indictment of the defendant and in this term, the case is presently set for trial in.

Let the record further show that during the November, 1979 Term of Court, this case was pre-set for April the 10th, 1980.

The Court will now rule on the motion to dismiss as amended and changed by the statements already in the record; that the State of Mississippi and Defense Counsel agreeing that the statement made by the Court is a true statement of the facts, events and circumstances of this case from the indictment, up to and including today; that based on the above and foregoing facts, the motion to dismiss the indictment be and the same is hereby overruled.

Bob, let the record show that by agreement and consent of the Court, the State of Mississippi and the defense do hereby stipulate and agree that the defendant Malcolm Joe Davis was born--

BY MR. PYLES:

March the 9th, 1947.

BY THE COURT:

--And that his age at the time of the alleged crime was thirty-two years of age.

****

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. 4839

MALCOM JOE DAVIS

MOTION FOR NEW TRIAL

Comes now, Malcom Joe Davis, defendant, by his attorneys, and moves the court to set aside the verdict of the jury and the judgment therein entered and to grant unto him a new trial, and in support of his said motion, assigns the following grounds, to-wit:

1. The court erred in admitting testimony and evidence offered by the State over the objections of the defendant in each and every instance, as shown by the stenographic record of the trial and proceedings therein, reference thereto being made in aid thereof.

2. The court erred in sustaining the objections of the State to the testimony and evidence offered on behalf of the defendant in each and every instance, as shown by the stenographic notes of the trial and proceedings therein, reference thereto being made in aid thereof.

3. The court erred in refusing the defendant's motion for dismissal and acquittal made at the conclusion of the State's case.

4. The court erred in allowing, over the defendant's objection, the Sheriff of Pearl River County, while serving as a court bailiff, to remain inside the courtroom and to hear the evidence and testimony of the other witnesses prior to his testifying as a witness to prove the two signed confessions of the defendant.

5. The court erred in allowing into evidence the confessions of the defendant introduced during the trial by the State, over defendant's objection, as having been made after he had been promised leniency, hope of reward, and

assistance for his cooperation by the district attorney's investigator, an agent for the State, and after the defendant had been interrogated over a long period of time and into the early hours of the morning and at a time when he was tired and sleepy and unable to resist pressure placed on him by the Sheriff and his deputy.

6. The court further erred in allowing the confessions of the defendant over the objection of the defendant as having been made at a time when he was unable to resist stress and psychological pressure from the interrogating officers.

7. The court erred in refusing to grant the motion of the defendant for a mistrial when the State's witness, Mason Sistrunk, exhibited certain pieces of evidence to the jury at a time when it had not been offered and which was never offered nor ruled as admissible.

8. The court further erred in allowing the prosecution to expose all the State's evidence to the jury and then to refuse to offer it for a ruling as to the admissibility thereof which denied the defendant his right to cross-examination and which prejudiced the defendant's right to a fair and impartial trial.

9. The court erred in failing to sustain the defendant's motion for dismissal at the conclusion of the State's case in that the State had wholly failed to prove the elements of forcible rape in said case.

10. The verdict of the jury and the judgment entered thereon are contrary to and against the overwhelming weight of the credible evidence and testimony in this case, as shown by the stenographic notes of said evidence and testimony, reference thereto being made in aid thereof.

11. The verdict of the jury is contrary to the weight of the evidence herein and evinces bias and prejudice on the part of the jury against the defendant.

12. The court erred in failing to give the defendant a trial at the November, 1979 term of the Circuit Court of

Pearl River; in denying defendant's motion to dismiss based on the violation of defendant's rights under Amendment VI of the Constitution of the United States and Article 26 of the Mississippi Constitution of 1890; and for failing to bring this case to trial within 270 days after the defendant was accused of the crime; and more than 270 days after the defendant appeared in court for arraignment.

13. The court erred in failing to grant the motion of the defendant to suppress the special venire.

14. The assistant prosecutor, during his summation in the trial, commented on the defendant's failure to testify in his own behalf and the court erred in denying the defendant's motion for mistrial.

And for other grounds apparent on the facts of the record.

WHEREFORE, defendant prays that the verdict of the jury, and the judgment, be set aside and that he be granted a new trial herein.

RESPECTFULLY SUBMITTED,
MALCOM JOE DAVIS, Defendant
BY: DIXON L. PYLES, DAVID R. SMITH AND F. KENT STRIBLING, Attorneys for Defendant

BY: _____
Of Counsel

CERTIFICATE

I, _____, one of the attorneys for the defendant, Malcom Joe Davis, do hereby certify that I have on this day mailed, postage prepaid, a true and correct copy of the foregoing Motion for New Trial to Honorable Phillip Singley, District Attorney, P. O. Box 642, Columbia, Mississippi 39429.

This the _____ day of April, 1980.

_____
Attorney for Defendant

DIXON L. PYLES
Jackson, Mississippi
DAVID R. SMITH
Poplarville, Mississippi
F. KENT STRIBLING
Jackson, Mississippi

THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

ASSIGNMENT OF ERRORS

The defendant-appellant, pursuant to Rule 6, assigns the errors of the Pearl River County Circuit Court in the paragraphs which follow:

I

The failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI, which is made obligatory on the state by Amendment XIV; aggravated his mental condition because the prolonged incarceration prior to his trial was unduly oppressive; maximized his anxiety and concern which accompanied the public accusation of the appellant; and greatly impaired his ability to defend himself.

II

The conduct of the trial judge amounted to an intrusion into the jury's fact finding role; it structured the verdict of guilty; it relieved the state of establishing "beyond a reasonable doubt" the charge against the defendant in the indictment; and it shifted to the defendant the burden of persuasion of his innocence.

III

The defendant's rights under Amendments VI and XIV of the Constitution of the United States and under MCA § 15-5-2 (1975) were violated by the failure of the state to select the special venire from a fair cross section of the population of Pearl River County.

IV

The procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process guaranteed by Amendment V; of the right to the effective assistance of counsel in violation of Amendment VI; and of the protection afforded by the "Mississippi Criminal Rules of Circuit Court Practice."

V

The constitutional rights of the defendant-appellant to be afforded a fair and impartial trial under Amendments V, VI, and XIV were abrogated by the action of the court:

(a) By refusing to grant a mistrial on the motion of the defendant when Mason Sistrunk, a witness for the state, purposely exhibited, displayed and exposed certain prejudicial objects to the jury before the objects were admitted into evidence, and thereafter when the state failed to offer the prejudicial objects into evidence denying the defendant the right to cross-examine the witness and procure testimony favorable to the accused.

(b) By refusing to grant a mistrial when the assistant prosecutor was allowed over objection to argue and comment on the failure of the defendant to testify in his own behalf.

(c) By refusing to grant the motion of the defendant to dismiss and discharge him at the conclusion of the state's case when the proof of the elements of the corpus delicti was wholly lacking, and again refusing at the conclusion of the trial to dismiss and discharge the defendant.

(d) By refusing to sustain the objections of the defendant to certain testimony of the state; and in sustaining the objections of the state to the evidence of the defendant.

VI

The court abused its discretion to the great prejudice of the defendant under the circumstances of this case in permitting Sheriff L. W. Holliday to serve as a baliff and remain

in the courtroom and hear the testimony of other witnesses and mingle with the other witnesses in the witness room; and in permitting him to testify over the objection of the defendant after all witnesses had been placed "under the rule" at the outset of the trial.

Dated: January 20, 1981

Malcolm Joe Davis
Defendant-Appellant

BY: _____
Of Counsel

BY: _____
Of Counsel

DIXON L. PYLES
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201

F. KENT STRIBLING
309 Barnett Building
200 South President Street
Jackson, Mississippi 39201

DAVIS R. SMITH
Smith, Smith, Tate & Stuart
Post Office Box 393
Poplarville, Mississippi 39370

CERTIFICATE

The undersigned certifies that on the date set forth hereafter a true copy of the Assignment of Errors was personally delivered to:

Honorable William Allain
Attorney General of Mississippi
Gartin Building
Jackson, Mississippi

Dated: December 20, 1981

Dixon L. Pyles

11

§ 25-31-21. Pro tempore appointment and compensation of appointees.

If, at the time of impaneling the grand jury in any circuit court, the district attorney be absent or unable to perform his duties or, if after impaneling of the grand jury, the district attorney be absent or unable to perform his duties or be disqualified, the court shall forthwith appoint some attorney at law to act for the state in the place of the district attorney during his absence or inability or disqualification, and the person appointed shall have the power to discharge all the duties of the office during the absence or inability or disqualification of the district attorney, and shall receive a reasonable compensation for his services, to be allowed by the court and certified to the auditor, who shall issue his warrant therefor. Such allowance shall be deducted from the salary of the district attorney, and shall not exceed the amount of the salary of the district attorney for the number of days allotted by law for the term of the court at which such appointees shall act.

SOURCES: Codes, Hutchinson's 1848, ch. 65, art 11 (3); 1857, ch. 6, art 72; 1871, § 216; 1880, § 258; 1892, § 1559; 1906, § 1666; Hemingway's 1917, § 1403; 1930, § 4367; 1942, § 3924; Laws, 1898, ch. 58.

Cross ref...

15

§ 7-5-53. To assist district attorneys.

The attorney general shall, when required by the public service or when directed by the governor, repair in person, or by any regular or specially designated assistant, to any county or district in the state and assist the district attorney there in the discharge of his duties and in any prosecution against a state officer, and shall have the same right as the district attorney to enter the grand jury room while the grand jury is in session and to perform such services with reference to the work of the grand jury as the district attorney is authorized by law to perform.

SOURCES: Codes, 1892, § 184; 1906, § 190; Hemingway's 1917, § 3478; 1930, § 3674; 1942, § 3845.